INDEX

Table of Citations	ii
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Argument	3
Conclusion	8

TABLE OF CITATIONS

Cases

Boyce, Motor Lines, Inc. v. United States, 342 U.S. 337, 340 ---- 6
Kois v. Wisconsin, 408 U.S. 229 (1972) ---- 8
Miller v. California (1973) 37 L. Ed. 2d 419 ---- 3, 4, 5, 6
Paris Adult Theater v. Lewis R. Slaton (1973) 37 L. Ed. 2d 446 ---- 5
Roth v. United States, 354 U.S. 476 ---- 6, 8
State ex rel. Keating v. A Motion Picture Entitled Vixen, 35 Ohio St. 2d, 215 ---- 5
(Prior opinion, 27 Ohio St. 2d 278) ---- 7
State ex rel. Sensenbrenner v. Adult Book Store, et al., 35 Ohio St. 2d 220 ---- 3, 6, 7
United States v. Harris, 347 U.S. 612 ---- 6
United States v. Reidel, 402 U.S. 351 ---- 5, 8
United States v. Ragen, 314 U.S. 513 ---- 6
United States v. Petrillo, 322 U.S. 1; 91 L. Ed. 1877 ---- 6
United States v. Wurzbach, 280 U.S. 396 ---- 6

CONSTITUTIONAL PROVISIONS

First Amendment ---- 1, 2
Fourteenth Amendment ---- 2
Ohio Constitution, Sec. 7(B)(1)(f), Art. IV ---- 7

STATUTORY PROVISIONS

Ohio Revised Code, Sections 2905.34, 2905.35, 2905.37 ---- 2, 3, 4, 8
Ohio Revised Code, Section 2905.343 ---- 2
Ohio Revised Code, Section 2905.34(A) ---- 4

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ADULT BOOK STORE: MANAGER, ADULT BOOK STORE; STAG'S BOOK STORE; OWNER, RICHARD A. BLAIR; UNION CIGAR STORE; OWNER, BERT NIXON,

Petitioners,

STATE OF OHIO, ex rel., M. E. SENSENBRENNER, MAYOR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

TO: The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent prays that a Writ of Certiorari to review the judgment of the Supreme Court of the State of Ohio, entered in the above entitled case on September 26, 1973, be denied for the reason that said judgment is consistent with the standards and requirements of the First Amendment of the Constitution of the United States, and the statutes pursuant to which said judgment was rendered conform to and are consistent with the requirements of the First Amendment, as applied to the facts of this case.

OPINIONS BELOW

The opinions rendered in the Courts below, as well as the prior order of this Honorable Court, are correctly set forth by Petitioners in the Appendix to their petition and are adequately referred to in said Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether Sections 2905.34, 2905.35 and 2905.37 of the Revised Code of Ohio are unconstitutional and violative of the protection afforded petitioners under the Frst Amendment to the Constitution of the United States.

2. Whether the 127 magazines in issue are obscene materials, the distribution and sale of which are not guaranteed and protected by the First Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution and the provisions of Ohio Revised Code Sections 2905.34, 2905.35 and 2905.37 are correctly set forth in Section L of the Appendix to the Petition (pages A-69, A-70, A-71 and A-72).

STATEMENT OF THE CASE

On June 4, 1970, the Respondent, M. E. Sensenbrenner, in his capacity as Mayor and chief executive officer of the City of Columbus filed an amended petition to enjoin the sale and distribution of 127 alledgedly obscene magazines pursuant to Section 2905.343 of the Ohio Revised Code. (Petitioner's Appendix B).

The Petitioners having duly answered, the case came on for trial on the merits before Judge Charles Petree, Judge Franklin County Court of Common Pleas on June 16, 1971. Expert witnesses appeared on behalf of both the Petitioners and Respondent to testify as to their opinion of the obscenity of the magazines in question. On August 3, 1970, Judge Petree rendered a decision finding all 127 magazines obscene and issued a permanent injunction enjoing their sale and distribution within the City of Columbus, Ohio. (Petitioner's Appendix E).

The decision of the Franklin County Court of Common Pleas was affirmed on March 2, 1971, by the Court of Appeals of Franklin County, Ohio. (Petitioner's Appendix G).

On September 15, 1971, the Ohio Supreme Court denied the Petitioner's application for leave to appeal for the reason that no substantial constitutional question exists. (Petitioner's Appendix H).

Petitioners thereafter filed their petition for a Writ of Certiorari in this court which was granted on June 25, 1973. This Court remanded the case for further consideration in the light of *Miller v. California* (1973) 37 L. Ed. 2d 419 and companion cases.

Upon remand, the Ohio Supreme Court considered the cases "pursuant to Appellant's motion to certify the record" and affirmed the judgment of the Court of Appeals. *(State ex rel., Sensenbrenner v. Adult Book Store, et al.,* 35 Ohio St. 2d 220; Petitioner's Appendix J). Petitioners now seek a Writ of Certiorari to review the above judgment.

ARGUMENT

Petitioners contend that Section 2905.34 of the Ohio Revised Code is unconstitutional because it is (A) void for overbreadth, and (B) void for vagueness. They con-

clude that if Section 2905.34, the definition section is void, Section 2905.35 and Section 2905.37 must also fall.

I-A. WHETHER THE STATUTES ARE VOID FOR OVERBREADTH

Petitioners assert on page 9 of their Petition that: "Section 2905.34(A) prohibits nudity and/or sexual conduct if its dominant appeal is to purient interest or its dominant tendency is to arouse lust."

However, a careful reading of Section 2905.34(A) of the Ohio Revised Code reveals that the finding of such purient interest must be "dominant" and judged with reference to ordinary adults considering the material as a whole. (R.C. 2905.34 A-1).

The arousal of lust is prohibited when such lust is aroused by a dominant tendency displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite (2905.34 A-2) or by displaying or depicting bestiality or extreme or bizarre violence, cruelty or brutality. (2905.34 A-3)

Petitioners assert that the statute is unconstitutional because it does not contain the precise words of *Miller v. California*, in that the phrases "contemporary community standards," "in a patently offensive way" and "lacks serious literary, artistic, political or scientific value," do not appear.

We would rejoin that the words *judged with reference to ordinary adults* is a sufficient measure of contemporary standards, *that the phrase "when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral or artistic purpose"* (R. C. 2905.34 A-1) and the general description of the

subject matter prohibited meets sufficiently the other two requirements of *Miller*.

It was not the intention of this Court in *Miller v. California* to write the ideal State statute. In the course of the opinion the Court stated:

> "We emphasize that it is not our function to propose regulatory schemes for the states. That must await their concrete legislative efforts." (Sec. II of Opinion)

In the companion case of *Paris Adult Theater v. Lewis R. Slaton* (1973) 37 L. Ed. 2d 446, this Court reiterated:

> "It should be clear from the outset that we do not undertake to tell the states what they must do, but rather to define the area in which they may chart their own course in dealing with obscene materials."

Thus the Court has reaffirmed the 7th paragraph of the syllabus of *United States v. Reidel,* 402 U.S. 351 in which this Court stated:

> "The task of restructuring the obscenity laws lies with those who pass, repeal and amend statutes and ordinances."

Miller v. California provided guidelines for the trier of the facts rather than for the legislature. After having provided the three-pronged test this Court concluded:

> "If a state law that regulates obscene material is thus limited, as written or *construed,* the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review when necessary." (emphasis supplied)

There is every reason to support the contention that the Ohio Supreme Court so construed the Ohio Code section involved in its decision on remand. (See *State ex rel. Keating v. A Motion Picture Entitled Vixen,* 35 Ohio St. 2d, page 215, to which case the Court referred

in its decision in *State ex rel. Sensenbrenner v. Adult Book Store, et al.*, 35 Ohio St. 2d 220.) As applied to the facts of this case it cannot be successfully contended that the statute is overly broad.

I-B. WHETHER THE STATUTES ARE VOID FOR VAGUENESS

Petitioners next argue that the statute is void for vagueness. On page 12 of the Petition they give certain examples of what they consider vagueness, ambiguities and moral judgments. We find that ther terms objected to are susceptible of understanding by the ordinary adult and certainly meet the requirements of the definition of a criminal offense.

However, as suggested by this Court in *Miller v. California* it is not required to define regulated material with ultimate god-like precision.

Many decisions have recognized that the terms of obscenity statutes are not precise. This Court, however, has consisently held that the lack of precision is not itself offensive to the requirements of due process. (*Roth v. United States*, 354 U.S. 476.) The Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. (*U.S. v. Petrillo*, 322 U.S. 1; 91 L. Ed. 1877). Such words when applied according to Miller standards for judging obscenity give adequate warning of the conduct proscribed. (See *United States v. Harris*, 347 U.S. 612; 624 N. 15; *Boyce Motor Lines Inc. v. United States*, 342 U.S. 337, 340; *United States v. Ragen*, 314 U.S. 513; *United States v. Wurzbach* 280 U.S. 396).

In *Miller*, the Court spoke on the subject of vagueness

when it required that the sexual conduct be specifically defined. Sexual conduct is specifically defined in Section 4(D) and further limited in the first paragraph of Section 4 of R.C. 2905.34. The statute is therefore not void for vagueness.

II. WHETHER THE MATERIALS ARE OBSCENE

The second main argument of Petitioner is that the books in question are not obscene. This is a mere reassertion of the same point raised in the prior petition for a Writ of Certiorari filed in this case and in this Court during the October, 1971 term, being No. 71-773. In addition. Petitioners suggest that the Ohio Supreme Court did not conduct an independent review upon remand.

However, the Opinion in *State ex rel. Sensenbrenner, Mayor, v. Adult Book Store,* 35 Ohio St. 2d 220, shows that the Court allowed the motion to certify the record from the Court of Appeals, and therefore presumably had before it the entire record, including the exhaustive and well reasoned opinion of the Court of Appeals. In addition, the Court pointed out that it was applying the sections of the Code to the case at bar even though those statutes were not in existence at the time. The Court referred to their first Opinion in the *Vixen case,* 27 Ohio St. 2d 278, wherein the Court found on the question of whether to void the injunction that they had original jurisdiction under Section 7(B)(1)(f) Article IV, Ohio Constitution which provides that the Supreme Court shall have original jurisdiction in any case on review as may be necessary to its complete determination.

Having given Petitioners such independent review the Court found that R.C. 2905.34 and 2905.35 comport with

the standards enunciated by *Miller* and that the books in question were obscene.

It has been categorically settled by this Court that obscene material is unprotected by the First Amendment. (*Kois v. Wisconsin*, 408 U.S. 229; (1972) *United States v. Reidel*, 402 U.S. 351 (1972); *Roth v. United States*, 354 U.S. 476 (1957).

CONCLUSION

For the reasons set forth herein above, the Petition should be denied.

CITY OF COLUMBUS,
DEPARTMENT OF LAW
JAMES J. HUGHES, JR.
City Attorney
ROBERT A. BELL
First Assistant City Attorney
JOHN L. FRANCIS
Senior Assistant City Attorney
90 West Broad Street
Columbus, Ohio 43215
Attorneys for Respondent